In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 863

CLARENCE EUGENE MIDDLEBROOKS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Middle District of Florida, petitioner, a manufacturer of supercharger and turbine kits, was convicted on sixteen counts of mail fraud. 18 U.S.C. 1341.[1] Petitioner was sentenced to two years' imprisonment and fined $4,000 on eight counts, and was given a suspended sentence and five years' probation,

[1] The indictment originally contained 21 counts. The jury found petitioner not guilty on three counts and the government dismissed two.

to run consecutively with the two-year sentence, on the remaining counts. The court of appeals affirmed (Pet. App. A.).

In his charge to the jury (Tr. 962-989),[2] the trial judge defined a "fraudulent" statement as one made with intent to deceive for purposes of financial gain by a person who knows it to be untrue or is recklessly indifferent as to its truth or falsity (Tr. 979, 980). Petitioner, who represented himself at trial, took no exception to this instruction although he objected to other aspects of the charge. (Tr. 989, 990).

After the jury had begun its deliberations, the foreman asked the judge to repeat his original instruction because there was confusion as to the elements of mail fraud (Tr. 997). The judge repeated the essence of his previous charge (Tr. 997-1002), and told the jury he would gladly answer any other questions he could (Tr. 1002). One juror stated there was, among the jurors, "a difference of opinion as to what is considered ethical and fraudulent conduct" (Tr. 1002-1003). The judge responded that the jurors must resolve that difference among themselves, since he could not comment on the evidence (Tr. 1003). Another juror asked about the necessity for a unanimous verdict, and the court answered him fully (Tr. 1003-1005). Petitioner took no exception at trial (Tr. 1006), but now argues that he was denied due process of law when the court failed to give additional clarifying instructions distinguishing ethical and fraudulent conduct.

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[2] "Tr." refers to the seven-volume transcript of proceedings before the district court. We are lodging a copy of Volume VII, which contains the instructions to the jury, with the clerk.

If a trial judge's initial charge to the jury is correct, he may, in his discretion, decline to answer a subsequent specific inquiry from the jury on the ground it would require him to comment on the evidence. *Eisenhardt* v. *United States*, 406 F.2d 449, 451 (C.A. 5). Petitioner does not dispute the correctness of the initial charge. Immediately before the judge was informed of the disagreement among the jurors concerning ethical and fraudulent conduct, he had repeated the substance of that charge. This was a sufficient response to any jury inquiries concerning the meaning of fraud. See *United States* v. *Padell*, 262 F.2d 357 (C.A. 2), certiorari denied, 359 U.S. 942.[1]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

Solicitor General.
ERWIN N. GRISWOLD,

NOVEMBER 1970.

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[1] Petitioner relies upon *Bollenbach* v. *United States*, 326 U.S. 607. In that case the trial judge, in response to an inquiry from the jury, gave an off-the-cuff supplemental instruction which this Court described as "simply wrong." 326 U.S. at 613. The Court also criticized the "cursory" nature of the instruction. 326 U.S. at 612-613. The supplemental instruction in this case, by contrast, was neither erroneous nor cursory.

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